FILED
United States Court of Appeals
Tenth Circuit

May 30, 2012

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re:

TIMOTHY SHAUN JOHNSON,

Movant.

No. 12-6127
(D.C. No. 5:94-CR-00064-C-1)
(W.D. Okla.)

ORDER

Before **O'BRIEN**, **TYMKOVICH**, and **MATHESON**, Circuit Judges.

Timothy Shaun Johnson seeks authorization to file a second or successive 28 U.S.C. § 2255 motion to vacate, set aside or correct his sentence. We deny authorization.

Mr. Johnson was found guilty after a jury trial of numerous offenses, including conspiracy to distribute cocaine; distributing cocaine; aiding and abetting interstate travel in aid of racketeering; and knowingly using or carrying a firearm during a drug trafficking crime. He was sentenced to 410 months' imprisonment. His convictions and sentence were affirmed on direct appeal. *See United States v. Johnson*, No. 94-6425, 1995 WL 678514, at *1 (10th Cir. Nov. 15, 1995). Mr. Johnson filed his first § 2255 motion in 2000. The district court denied the motion and we denied his request for a certificate of appealability. *See United States v. Johnson*, No. 99-6222, 2000 WL 223593, at *2 (10th Cir. Feb. 28, 2000).

In 2006, Mr. Johnson filed a motion for authorization to file a second or successive § 2255 motion based on the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). We denied the motion because the Supreme Court had not expressly held that the rule announced in *Booker* should apply retroactively for the purposes of second or successive § 2255 motions. *See United States v. Johnson*, No. 06-6012, slip. op. at 1-2 (10th Cir. Feb. 15, 2006) (citing *Bey v. United States*, 399 F.3d 1266, 1269 (10th Cir. 2005)).

Mr. Johnson has now filed another motion for authorization to file a second or successive § 2255 motion. In order to be entitled to authorization, he must show that he has new claims that rely on:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h).

Mr. Johnson contends that he has newly discovered evidence that two of his co-defendants, who entered into plea agreements and testified against him at trial, lied during their testimony. Mr. Johnson asserts that Morris Johnson, his brother, admitted to him in a recent conversation that he lied to the jury, although he does not specify what Morris lied about. Instead, he states that, "Morris Johnson told me that they had him lying about a whole lot of stuff at my trial." Memo. in Supp. at 1 (attached to Mot. for Authorization). He also asserts that Charles Watson, another

witness, lied to the jury by saying that he did not get a deal from the prosecution, when in fact Mr. Watson was promised a deal of seven years.

In order to meet the standard for authorization, the newly discovered evidence must demonstrate "a high probability of actual innocence." *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005) (discussing similar standard in 28 U.S.C. § 2244(b)(2)(B)). Mr. Johnson's new evidence that Mr. Watson lied about the fact that he was receiving a deal from the prosecution does not offer any new evidence establishing Mr. Johnson's actual innocence. Instead, Mr. Johnson's new evidence represents potential impeachment evidence. The Supreme Court has held that such evidence "will seldom, if ever, make a clear and convincing showing that no reasonable juror would have believed" the witness's testimony. *Sawyer v. Whitley*, 505 U.S. 333, 349 (1992).

Mr. Johnson's new evidence that Morris Johnson lied during his trial testimony also is insufficient to meet the standard for authorization. First, Mr. Johnson gives no specific information regarding what Morris lied about; instead, he asserts generally that Morris told him he lied about "a whole lot of stuff." Second, although Mr. Johnson contends that he could not have been convicted without Morris's testimony, there were at least three other witnesses—Floyd Bush, Ramon Cartznes, and Larry Stutson—who testified about the conspiracy at trial. *See United States v. Owens*, 70 F.3d 1118, 1122 (10th Cir. 1995). That testimony showed that Mr. Johnson had significant involvement in the conspiracy. *See id*. at 1122-23.

Moreover, in Mr. Johnson's direct appeal, he challenged the admission of certain out-of-court statements by his coconspirators, but we explained that there "was sufficient independent evidence to support the district court's finding Timothy Johnson was involved in the predicate conspiracy." *Johnson*, 1995 WL 678514, at *2. The information was provided by other members of the conspiracy, including Ramon Cartznes, who was the conspiracy's Los Angeles supplier, and was based on their own personal knowledge. The independent evidence showed that Mr. Johnson was responsible for: (1) contacting retail distributors and supplying them with cocaine; (2) arranging for cocaine to be transported from California to Oklahoma City for distribution by the conspiracy; (3) paying Mr. Cartznes for the cocaine he provided to the conspiracy; and (4) ensuring that any powdered cocaine supplied by Mr. Cartznes was cooked into crack cocaine. *Id.*

Mr. Johnson has failed to present new evidence "establish[ing] his innocence by clear and convincing evidence." *Calderon v. Thompson*, 523 U.S. 538, 558 (1998) (discussing similar standard in 28 U.S.C. § 2244(b)(2)(B)). Accordingly, we DENY his motion for authorization. This denial of authorization "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court

ELISABETH A. SHUMAKER, Clerk